

1. 1501221 (Migration) [2015] AATA 3354 (3 September 2015)
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DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Amir Abbas Ahmed Elrabaa

VISA APPLICANT: Mrs Nashwa Mamdouh Ismat Abdalla

CASE NUMBER: 1501221

DIBP REFERENCE(S): OSF2014/03007 OSF2014/031518

MEMBER: Alan Duri

DATE: 3 September 2015

PLACE OF DECISION: Sydney

DECISION: The tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa:

- Public interest criterion 4020(1) for the purposes of cl.309.225 of Schedule 2 to the Regulations.

Statement made on 03 September 2015 at 3:25pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 December 2014 to refuse to grant Mrs Abdalla a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958*.
7. Mrs Abdalla was born in 1982 in Sudan.
8. Mrs Abdalla applied for the visa on 3 March 2014 on the basis of her marriage to Mr Elrabaa, an Australian citizen.
9. Mr Elrabaa was born in 1969 in Sudan and arrived in Australia on 30 September 2006 on Subclass 309 provisional partner visa. He was granted a Subclass 100 permanent partner visa on 22 April 2010.
10. The background is as follows:
 - Mrs Abdalla and Mr Elrabaa were married in 2001 and had three children. They claim to have divorced on 8 December 2005. Mr Elrabaa subsequently married an Australian citizen Christine Zoumis, who in turn sponsored Mr Elrabaa's partner visa application.
 - In 2009 Mr Elrabaa travelled to Egypt to spend time with Mrs Abdalla, who became pregnant with her fourth child. Following his return to Australia, Mr Elrabaa sponsored his children to migrate to Australia.
 - In 2013 Mr Elrabaa returned to Sudan and divorced Ms Zoumis and on the following day on 18 July 2013 remarried Mrs Abdalla.
 - As a part of the visa application, Mrs Abdalla supplied her marriage certificate dated 18 July 2013.
 - On 18 May 2014, the department received information from the Sudanese embassy in Cairo, stating that the marriage certificate was fraudulent. The department also examined the divorce certificate and on 26 August 2014 the department confirmed that the divorce certificate was a counterfeit document.
11. The delegate refused to grant the visa on the basis that Mrs Abdalla did not satisfy the requirements of cl.309.225 of Schedule 2 to the Migration Regulations 1994 because public interest criterion 4020 was not satisfied. The delegate was not satisfied that there was any basis to waive the requirements.
12. **Hearing**
13. Mr Elrabaa appeared before the tribunal on 11 June 2015 to give evidence and present arguments. The tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
14. Mr Elrabaa was represented by his registered migration agent Linda George.
15. Mr Elrabaa told the tribunal that none of the documents provided were bogus.

16. The tribunal asked Mr Elrabaa about the divorce certificate. He stated at the time he was employed by an Egyptian airline company in Khartoum. Mr Elrabaa indicated to a colleague that he wished to get divorced. At the time Mr Elrabaa was still living with his wife, Mrs Abdalla, but wanted to marry Ms Zoumis. Although he is allowed to marry more than one woman, Mrs Abdalla objected and she suggested a divorce. The colleague indicated that he would be able to get divorced at the office. A few days later the colleague arranged for a ma'azoom (celebrant) to attend the office. Mr Elrabaa told the ma'azoom that he wants to separate from his wife. The ma'azoom opened a book and took down their names and Mr Elrabaa paid him some money. Two days later the ma'azoom came back to the office and gave Mr Elrabaa a copy of the divorce certificate. Mr Elrabaa indicated that up until this point, Mrs Abdullah was not aware of what he was doing as far as the divorce was concerned. He later gave the document to his wife.
17. Mr Elrabaa claimed that he had no other knowledge of how divorce certificate was produced. Mr Elrabaa told the tribunal that he was shocked when he was told that the document was a counterfeit document. He stated that he attended the Sudanese embassy and was told words that effect that the divorce certificate was genuine and was given a statement to that effect. The tribunal noted that the document question. In fact, was a Sudanese embassy official witnessing his oath. There is nothing in the document provided that suggests that the Sudanese officials indicate that the divorce certificate itself was genuine. At any rate Mr Elrabaa told the tribunal that he entrusted the ma'azoom to make the arrangements and has no knowledge of how it can be considered a forged document.
18. The tribunal noted that the translation of the divorce certificate appeared to have less text than the Arabic version. The tribunal asked interpreter to review the contents of the divorce certificate and was advised that the certificate has provision for the signatures of the respective parties. The tribunal noted that the provision for Mrs Abdalla's signature on the divorce certificate would appear to contradict his evidence that Mrs Abdalla is not party to the production of the divorce certificate. Mr Elrabaa gave evidence effect that he was not sure how those signatures came to be on the divorce certificate.
19. Mr Elrabaa provided the tribunal with his original (second) marriage certificate to Mrs Abdalla. Mr Elrabaa noted that the document has been authenticated by the Sudanese authorities.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The question before the tribunal is whether Mrs Abdalla meets public interest criterion 4020 as required by cl.309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
21. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). Public interest criterion 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

22. The divorce certificate dated 8 December 2005 is clearly a bogus document. The Sudanese authorities think so (on at least two occasions) and the department's document examiners found printing irregularities. Furthermore Mr Elrabaa's evidence as to the divorce certificate's provenance corroborates a finding that the divorce certificate is bogus.
23. An important point is that the divorce certificate was not given by Mrs Abdalla in her partner visa application. The divorce certificate was provided to the department by Mr Elrabaa in regards his own partner visa application with Ms Zoumis. It is very clear with the benefit of hindsight that there are serious concerns as to the nature of Mr Elrabaa's relationship with Ms Zoumis. This concern is based on the combination of the fake divorce certificate and Mr Elrabaa's ongoing relationship with Mrs Abdalla as evidenced by the birth of her fourth child not long after Mr Elrabaa was granted a permanent partner visa on the basis of his relationship with Ms Zoumis.
24. However the question before the tribunal is not whether or not Mr Elrabaa was in a contrived relationship with Ms Zoumis (and the evidence certainly suggests it was a contrived relationship), but rather whether or not Mrs Abdalla gave the department a bogus document or information that is false or misleading in a material particular in relation to the application for the visa.
25. As a part of the visa application Mrs Abdalla supplied a marriage certificate dated 13 July 2013. There appeared to be concerns that this document was also bogus. The marriage certificate was sent to the Sudanese Embassy in Cairo for verification. On 19 May 2014 the Embassy reported that the document was fraudulent. Mr Elrabaa provided the original (religious) marriage certificate as well as a civil certificate dated 21 July 2014. On 24 August 2014 the department arranged for the various marriage certificates and divorce certificate (obtained from Mr Elrabaa's file) to again be authenticated. Only the divorce certificate was clearly found to be fraudulent. Given this the tribunal is prepared to accept that there is insufficient evidence that the marriage certificate of 13 July 2013 is a bogus document.
26. The tribunal notes the delegate's reasoning that although the marriage certificate may well be genuine, it was "*obtained through providing fraudulent information*". The tribunal assumes that the delegate is referring to the fake divorce certificate and an assumption that the fake divorce certificate was used to obtain the marriage certificate. If this was the case then the marriage certificate could fall into the definition of a bogus document (s.5(1)(c) of the Act). However the tribunal considers that it is speculative as to what information was provided to the Sudanese authorities. For example there are various forms of divorce in Sudanese law, one of which does not require court or official intervention. There is no evidence that the particular fake divorce certificate was actually used in the process of obtaining the marriage certificate. In summary the tribunal thinks that there is insufficient

evidence to reasonably suspect that the marriage certificate was obtained because of a false or misleading statement.

27. The tribunal makes it clear that there has been an extremely unsatisfactory history concerning Mr Elrabaa's own visa history. However the tribunal thinks there is insufficient evidence that Mrs Abdalla (who is the applicant in this case) has given a bogus document or information that is false or misleading in a material particular in relation to the application for her visa (cl.4020(1)(a)). Ms Abdalla has never held an Australian visa so cl.4020(1)(b) is not applicable.
28. The tribunal is prepared to accept that Mrs Abdalla meets cl.4020(1).

DECISION

29. The tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa:
 - Public interest criterion 4020(1) for the purposes of cl.309.225 of Schedule 2 to the Regulations.

Alan Duri
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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